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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

EDUARDO MURILLO,

Defendant and Appellant.

D052909

(Super. Ct. No. SCD210557)

APPEAL from a judgment of the Superior Court of San Diego County, Jeffrey F. Fraser, Judge. Reversed and remanded.

Eduardo Murillo appeals a judgment sentencing him to two consecutive eight-month prison terms and four concurrent eight-month prison terms after pleading guilty to all six counts alleged against him. He contends that the concurrent sentences imposed for four of the counts violate Penal Code section 654 and should be stayed. He further contends that this claim is not barred by California Rules of Court, rule 4.412(b) because he did not agree

to specified prison term within the meaning of that rule. (All rule references are to the California Rules of Court.) We agree and reverse the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On the night of September 29 or the early morning of September 30, 2007, Eduardo Murillo broke the window of a parked car and took a wallet from inside. The wallet contained a driver's license and credit card belonging to the owner of the car, Raymond Day.

After the car burglary, Murillo entered the 7-Eleven store at 9609 Aero Drive and attempted to use Day's credit card and driver's license to purchase California state lottery tickets and merchandise in two transactions. During the second transaction, a store clerk examined the driver's license closely and realized that Murillo was not the person pictured thereon. Murillo fled, grabbing the merchandise and leaving the stolen credit card and driver's license on the counter. He was later arrested with a substantial number of lottery tickets in his pockets and identified by the store clerks as the person who made the purchases with the stolen credit card and driver's license.

Murillo was charged with two counts of second degree burglary (counts 1 and 2) and one count each of unlawfully acquiring access card account information (count 3), fraudulent use of another's access card (count 4), petty theft with an access card (count 5), and possession of stolen property (count 6). He pled guilty to all six counts with no agreement regarding sentencing. The maximum sentence listed on the plea form for these six counts was three years eight months.

On April 15, 2008 Murillo was sentenced in another case, for which he received a total of 13 years in prison. In the present case, the court sentenced Murillo to consecutive terms of eight months (one-third the middle term) for counts 1 and 3 consecutive to the sentence imposed in case SCD210485, and concurrent terms for the remaining four counts. The aggregate prison term for both cases was fourteen years four months.

DISCUSSION

I. No Certificate of Probable Cause Is Required

Generally, "to appeal from a superior court judgment after a plea of guilty or nolo contendere . . . the defendant must file . . . the statement required by Penal Code section 1237.5 for issuance of a certificate of probable cause." (Rule 8.304(b)(1).) However, no certificate of probable cause is required for appeals based on "[g]rounds that arose after entry of the plea and do not affect the plea's validity." (Rule 8.304(b)(4)(B).)

Determining whether a certificate of probable cause is necessary requires "an individual analysis whether the appellate claim at issue constitutes, in substance, an attack on the validity of the plea." (*People v. Buttram* (2003) 30 Cal.4th 773, 790.) When a plea agreement is made the "exact bargain [the parties] make affects whether a subsequent appeal, in substance, is an attack on the validity of the plea." (*Id.* at p. 785.) Issues unresolved by the agreement are left to the discretion of the trial court and reviewable on appeal without a certificate of probable cause. (*Ibid.*)

The appeal here arises from the court's exercise of discretion in imposing sentence after the plea was entered. Because Murillo entered the plea with no agreement regarding

sentencing or the dismissal of other charges, this appeal is not an attack on the plea's validity and no certificate of probable cause is required.

II. *The Terms Imposed For Counts 3, 4, 5 and 6
Are Invalid Under Penal Code Section 654*

Appellant contends, and respondent agrees, that the terms imposed for counts 3, 4, 5 and 6 violate Penal Code section 654, which prohibits multiple punishments for a single act or indivisible course of conduct. (*People v. Hester* (2000) 22 Cal.4th 290, 294; *People v. Miller* (1977) 18 Cal.3d 873, 885, overruled on other grounds in *People v. Oates* (2004) 32 Cal.4th 1048.) Penal Code section 654 states: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Whether a course of conduct is divisible "depends upon the intent and objective of the actor, and if all the offenses are incident to one objective[.]" (*People v. Miller, supra*, 18 Cal.3d at p. 885, quoting *People v. Bauer* (1969) 1 Cal.3d 368, 376.)

Regarding counts 3 and 6, Murillo entered Day's car with the intent to take property from inside, specifically a wallet, which contained the driver's license and credit card. His acquisition of the credit card charged in count 3 and possession of the license charged in count 6 are indivisible from the burglary in count 1 because all three offenses were committed with the single objective of taking property from the victim's vehicle. Because the court imposed an eight-month sentence for count 1, the sentences imposed for counts 3 and 6 violate Penal Code section 654.

Regarding counts 4 and 5, Murillo entered the convenience store to make purchases with the stolen credit card. His use of the credit card and the petty theft are indivisible from the burglary charged in count 2 because all three offenses were committed with the single objective of entering the store and using the credit card to obtain merchandise. Because the court imposed a two year sentence for count 2, the sentences imposed for counts 4 and 5 violate Penal Code section 654.

III. *Rule 4.412(b) is Inapplicable*

The Attorney General contends that rule 4.412(b) bars appellant's claim because he was sentenced to a term contemplated by his plea. Rule 4.412(b) states: "By agreeing to a specified prison term personally and by counsel, a defendant who is sentenced to that term or a shorter one abandons any claim that a component of the sentence violates [Penal Code] section 654's prohibition of double punishment, unless that claim is asserted at the time the agreement is recited on the record." This rule is inapplicable here as Murillo entered his guilty plea with no agreement regarding sentencing.

Respondent argues that rule 4.413(b) bars Murillo's claim because he was apprised of the maximum possible term that could be imposed as a result of his guilty plea and was sentenced to a term within that limit. Respondent cites *People v. Hester, supra*, 22 Cal.4th at page 296, which held that rule 4.412(b) barred a claim under Penal Code section 654 where the defendant pleaded guilty with a promise that he would be sentenced to no more than four years and was then sentenced to four years. In *Hester*, the four-year maximum agreed to was not the legal limit which could have been imposed if the defendant were

found guilty on all counts, but rather a lower sentence indicated by the judge and agreed to by defendant. No such agreement was made in this case.

In California every defendant who pleads guilty is informed of the maximum sentence that may be imposed as a result of their plea. This universal admonishment is not the same as the "specified prison term" required by the plain language of rule 4.412(b). Rule 4.412(b) does not apply where, as here, no plea agreement is made.

DISPOSITION

The judgment is reversed and the matter remanded for resentencing in accordance herewith.

McINTYRE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

McDONALD, J.